

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE MERRILL LYNCH & CO., INC. :
RESEARCH REPORTS :
SECURITIES LITIGATION :

02 MDL 1484 (MP)

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In re: Merrill Lynch InfoSpace :
Analyst Reports Securities Litigation :
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01 CV 6881 (MP)

DECISION

Plaintiffs have moved this Court pursuant to Sec. 21D(b)(3)(B) of the Securities Exchange Act of 1934 for an Order lifting the automatic stay of discovery. Plaintiffs' essential claim is that discovery is necessary to preserve and restore emails that Defendant Henry Blodget ("Blodget") himself, and through his subordinates, deleted.

The Court will not countenance the destruction of evidence and will freely respond with appropriate sanctions if it determines, should this case go so far as discovery, that this is in fact what happened. However, the Court is also all too familiar with the circumstances and reasons which led Congress to direct a stay of discovery during the pendency of a motion to dismiss an action under the Securities laws. See In re Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571 (HB), 2003 WL 21035383, at *1 (S.D.N.Y. May 06, 2003) (Berman, J.).

The Private Securities Litigation Reform Act ("PSLRA") mandates that "all discovery . . . shall be stayed during the pendency of a motion to dismiss." 15 U. S. C. § 78u-4(b)(3)(B). This provision is balanced by one imposing a contemporaneous duty on parties to preserve all relevant evidence "as if they were the subject of a continuing request for production of documents." See 15 U. S. C. § 78u-4(b)(3)(C). Those provisions were intended to preserve the status quo. Because the Court has been asked to consider, but has not yet ruled on, the legal sufficiency of the complaint, discovery here could be permitted only if exceptional circumstances, such as the necessity "to preserve evidence or to prevent undue prejudice to [a] party," exist. 15 U.S.C. § 78u-4(b)(3)(B); Vacold, LLC v. Cerami, No. 00 Civ. 4024 (AGS), 2001 WL 167704, at *6 (S.D.N.Y. Feb. 16, 2001) (Schwartz, J.).

As set forth in the declarations accompanying Defendants' opposition to Plaintiffs' motion, Defendants avow that they are aware of their obligations and have taken and are

continuing to take all necessary steps to preserve all potentially relevant electronic evidence. According to the explanations delivered to the Court, there is nothing that this Court could order Defendants to do to preserve the relevant evidence that they have not already done or represented to the Court that they will do. Therefore, an order lifting the mandatory, automatic stay of discovery is not warranted. There is no “imminent risk” established that any deleted data will be overwritten and rendered irretrievable. See Vivendi, 2003 WL 21035383, at *1.

Plaintiffs’ attempt to have any of the preserved materials produced to them is precisely at the heart of the rule enacted by Congress and thus is clearly inappropriate. The thrust of the PSLRA’s provisions is the preservation of evidence, not its production. “[L]ifting the stay is not necessary to preserve evidence when, as [appears] in this case, the party from whom discovery is sought has represented to the [C]ourt that it will maintain the evidence at issue.” Sarantakis, 2002 WL 1803750, at *3; see also In re Carnegie Int’l Corp. Sec. Litig., 107 F. Supp. 2d 676, 684 (D. Mar. 2000) (same); AOL Time Warner, Inc., 2003 WL 21729842, at *2 (same); Tyco Int’l Ltd. Sec. Litig., 2000 WL 33654141, at *2, 5 (same).

Thus, in the absence of exceptional circumstances here mandating discovery during the pendency of the motion to dismiss, Plaintiffs’ motion is hereby denied.

SO ORDERED.

Dated: New York, New York

February 18, 2004

MILTON POLLACK
Senior United States District Judge